IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4622 OF 2003

1. The State of Maharasthra through
the Principal Secretary, Government
of Maharasthra, Home Department,
Mantralaya, Mumbai 400 032.

2. The Commissioner of Police,
Navi Mumbai. ... Petitioners

Versus

Shri. Dilip Anant Surve,
Aged adult, Occ. Govt Service as
Police Constable in the office of
Commissioner of Police,
Navi Mumbai. ... Respondents

Mr. N.P. Deshpande, A.G.P. for Petitioner.

Mr. V.V. Pai for respondents.

CORAM : F.I. REBELLO &
S.P. KUKDAY,JJ.
DATED : MARCH 09, 2005

ORAL JUDGEMENT (Per F.I. Rebello,J.):
. Rule. Heard forthwith.

. The State of Maharashtra has challenged the order of MAT dated 15.11.2000 in O.A. No. 646 of 2000 relying on its earlier Order dated 1.7.1998 in O.A. No. 472 of 1999. By that order, it has been held that the departmental enquiry held against the respondent, delinquent employee was without authority of law and hence vitiated and consequently set aside the impugned order imposed on the respondent which was by way of dismissal

from service. The Petitioners were however, given liberty to start fresh enquiry if they chose to re-start the enquiry, to the appropriate Enquiry Officer as per relevant Government decisions. Subsequent to that judgement, a Full Bench of MAT was constituted consequent on MAT noticing, that there was divergent opinion amongst its Benches on the issue. By order dated 7.6.2002 the Full Bench was pleased to hold that the power to hold departmental enquiries under the Bombay Police Rules exists and continues to exist and that neither G.R. dated 29.12.1988 nor the subsequent circulars such as circular dated 11.1.1990 have taken away the said power conferred by the statutory rules. MAT also made it clear that the enquiries which had already been conducted and concluded and had become final cannot be affected or reopened consequent to the judgment. Considering this judgement, the impugned order of MAT it is contended is liable tobe set aside if otherwise the judgement can be supported.

2. A few facts may be set out for the purpose of deciding the controversy which has arisen in the present petition. The enquiry commenced against the respondent on 30.6.1998. The enquiry was concluded on 29.10.1988 and the order of dismissal

came to be issued on 13.5.1999. The appeal preferred was thereafter dismissed. Pursuant to which the Petitioner took out O.A. No. 646 of 2000 which was allowed by order dated 15.11.2000.

Hence, the present petition by the State.

3. The Full Bench Judgement, MAT, firstly dealt with G.R. dated 29.12.1998 and the subsequent G.R.s and circulars. The Full Bench proceeded to address itself to the issue, as to whether the G.R.s can be considered as rules framed as per power conferred under article 309 of the Constitution of India, considering the Full Bench Judgement of this court in Chandrakant Sakharam Karkhanis and Ors. Vs. State of Maharasthra and Ors. AIR 1977 Bombay 193. The Full Bench held that there is the Bombay Police Act, 1951 which had received the assent of the President on 1.6.1951. Rules came to be made under the said Act, known as the Bombay Police Punishment & Appeal Rules, 1956 which hereinafter shall be referred to as the rules. By virtue of Rule 1(2) all police officers, including Railway Police Officers, below the rank of Inspector in the State of Bombay are governed by the said Rules. The Full Bench then proceeded to hold that the G.R.s and the circulars are not applicable to police officers who are governed by

Bombay Police Rules and that they are applicable only in those cases of other Government servants who are not governed the Bombay Police Rules and are applicable to cases of other government servants such as those governed by M.C.S.R. (Discipline & Appeal) Rules, 1979. The learned Full Bench then proceeded to hold that there is no difficulty in accepting that the G.R. dated 29.12.1988 can be called as Rule framed under the proviso to Article 309 of the Constitution and it is applicable in the case of Class III and Class IV State Government employees. However, held, it is not possible to accept that it also covers the officers/employees of the police department. The Full Bench noted that the G.R. dated 29.12.1988, has been issued for achieving salutary objects, i.e. speedy disposal of departmental inquiries and by persons having expertise, as it was found that many inquiries were pending for a long time and many of them would have become finally futile if exercise was conducted by persons who were not well versed in it. And in these circumstances, G.R. dated 29.12.1988 was issued and thereafter circular dated 11.1.1990. The challenge on that ground was negatived. The contention that G.R. dated 29.12.1988 had been accepted by the Home Department in respect of Police Officers and employees covered

under the Bombay Police Rules was rejected by holding that it is well established that there can be no estoppal against statutory provisions. The further challenge was that the Government circular dated 6.1.2001 is having prospective effect and the inquiries which are to be initiated after that date can only be conducted by the police authorities. The learned Bench observed that G.R. dated 29.12.1988 and the subsequent circulars issued dated 11.1.1990 or 6.1.2001 cannot override the statutory rules framed under the Bombay Police Act, 1951. The nature of power to be exercised under Rule 16A was considered. It was next submitted that the Bombay Police Rules do not provide specifically for appointment of Enquiry Officer and in the absence thereof the G.R. dated 29.12.1988 and the circular issued by the Home Department dated 11.1.1990 should prevail. That contention was rejected by placing reliance on Rule 16A of the Rules.

4. At the hearing of this petition, on behalf of the Petitioners, their learned counsel points out that considering the judgment of the Full Bench, the order of MAT in so far as Respondent is concerned, should be set aside and the order of the Disciplinary authority be upheld. On the other

hand on behalf of the respondents, their learned counsel pointed out that merely because MAT has subsequently taken a view would not mean that the order should be set aside. It is pointed out that the view taken by the Full Bench is not the correct view. At any rate, it is submitted that even assuming this court accepted the contention as raised by the petitioners, on the facts of the case, as the petitioner has already been reinstated, pending the present writ petition, this court ought not to interfere with the said order and permit the petitioner to continue in service. The learned counsel pointed out that the Petitioner does not mind giving up backwages as and upto the date of re-instatement.

5. The question is whether the order of the Full Bench of MAT has correctly laid down the Law. Though that judgement is not directly impugned before us, its correctness will have to be considered considering the issue as raised here and has to be answered. For that purpose we will firstly have a look at the rules framed under the Bombay Police Act. By virtue of rule 1(2) they are made applicable to all police officers who are below the rank of Inspector in the State of Bombay.

Sub Rule (2) of Rule (1) reads as under :

"No Police Officer to whom these rules apply shall be departmentally punished otherwise than in accordance with the provisions of these rules."

. The major punishments which can be imposed are set out in Rule 3. By virtue of Rule 4 punishments as specified in rule (3) as set out in Rule (4), cannot be imposed unless a departmental enquiry into the conduct of the employee is held in an inquiry and a report containing reasons for passing an order imposing the said punishment is made in writing under the signature of the Disciplinary Authority. Rule 16A confers power on the I.G.P. or an authority competent to order departmental proceedings, for good and sufficient reasons to be recorded in writing, to transfer the proceedings pending against a police officer under these rules from one enquiry Officer to another. The schedule specifies the disciplinary authorities as per their rank.

. In other words, it is clear that the disciplinary authorities authorised to impose punishment on the delinquent employee have been specified. The disciplinary authority by virtue of

rule (4) cannot impose punishment as set out under rule (3) unless departmental enquiry has been held and by virtue of Rule (2) no police officer to whom rules apply can be departmentally punished without such enquiry. The only question is whether by a G.R. the power conferred on the disciplinary authority by rules can be taken away and vested in another authority other than disciplinary authority. We proceed on the footing that if the rules are silent, it is always open to the State in exercise of its executive powers to fill in the blanks or provide for those matters which have not been provided in the rules. It is also open that the disciplinary authority may himself not conduct the enquiry but can conduct the enquiry through other enquiry Officer who is under his control. In other words the enquiry need not necessarily be conducted by the Disciplinary Authority himself as long as the Enquiry Officer is an officer of a lower rank. The disciplinary authority in such cases, must make available the report of the enquiry officer to the delinquent employee and ask for his say, before the disciplinary authority impose punishment on the delinquent employee. The question is whether the Disciplinary Authority by a G.R. can be divested of his power to hold the enquiry or by an enquiry Officer, not appointed by

him. We are not going into the issue whether there is power to issue directions for setting out the procedure for holding the enquiry.

6. We may now peruse Article 309 of the Constitution of India for its true impart. Article 309 provides that subject to the provisions of the constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. By virtue of the proviso it is competent for the President or such person as he may be direct in the case of services and posts in connection with the affairs of the Union and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf, is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of such Act. In other words by the proviso in the absence of the competent legislature making legislation, it is open to the Governor in the case

of a State to make rules which will have force of law till such time law is enacted by the competent legislature is made. In the instant case, we have found that the competent legislation has already made an enactment known as Bombay Police Act. By virtue of powers conferred namely Rule Making power under the Act, the rules have been framed.

7. With that we proceed to consider Article 162 of the Constitution of India. Article 162 sets out that subject to the provisions of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. In other words, the executive power is coextensive with the legislative power and can be exercised if the legislative power has not been exercised. In service laws, as is now settled, even if the rules have been made under Article 309 of the Constitution of India, it is still open to issue instructions pursuant to Article 162, in those matters where rules are silent or not made. There is yet another article which may be noted, namely Article 166. That article provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. Article 166(2) then sets out that the

Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified by rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Sub rule (3) sets out that the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion. In other words, a cojoint reading of article 162 and 166 would show that the Executive power of the State must be exercised in the manner laid down under the business rules. In the absence of power being exercised in the manner it must be shown that the instructions issued are in exercise of the administrative power of the State to have binding effect as Law. Merely because some officers issue some instructions, by itself cannot be said to be pursuant to an exercise of executive powers of the State as understood under Article 162. Any other exercise would be an exercise of administrative powers which an officer may exercise

considering the post held and the duties which such officer has to exercise. That cannot be equated with the exercise of executive power which is extensive with the legislative powers under Article 162.

8. It is in this background, we have to now consider the effect of G.R.s. As noted earlier, if the G.R. is an executive instruction, it will only be applicable in the absence of legislation or rules made under the proviso to article 309 or in the event rules are made under Article 309 then to the extent which they seek to provide for matters which are not provided in the rules. Only such instructions will be applicable which are not in conflict with the rules. The true impact of Article 309 and 162 was noted by the Apex Court in the case of R.N.Nanjundappa Vs. Thimmiah and another, (1972) 1 Supreme Court Cases 409. The Apex Court considering the power was pleased to observe as under :

> "The contention on behalf of the State that a rule under Article 309 for regularisation of the appointment of a person would be a form of recruitment read with reference to power under

> Article 162 is unsound and unacceptable. The executive has the power to appoint. That power may have its source in Article 162. In the present case the rule which regularised the appointment of the respondent with effect from February 15, 1958, notwithstanding any rules cannot be said to be in exercise of power under Article 162. First, Article 162 does not speak of rules whereas Article 309 speaks of rules. Therefore, the present case touches the power of the State to make rules under Article 309 of the nature impeached here. Secondly when the Government acted under Article 309 the Government cannot be said to have acted also under Article 162 in the same breath. The two articles operate in different areas."

. In other words from the above observations, it would be clear that Article 309 is rule making power. That power must be exercised by the Governor, on the advice of the cabinet or rules made for that exercise of power. On the other hand article 162 does not provide for making any rules. It provides for issuing administrative instructions

which are normally done in the form of Government Resolutions. Secondly the exercise of executive power has to be done in the manner contemplated under Article 166. The position therefore, would be clear that the exercise of power under Article 162 and 309 is distinct. Power under article 309 must be specifically exercised to make rules under Article 309. It cannot be confused with the exercise of executive power of the State. Though the learned tribunal has relied on the Full Bench judgement of this court in the case of Chandtrakant Karkhanis (supra), considering the judgement in the case of Nanjundappa (supra), we really need not advert to it.

. Before we proceed further, we may also advert to the judgement in the case of Sham Tripathi Vs. U.p. State Public Services Tribunal and Others, (1997) 2 Supreme Court Cases 251. In that case the Petitioner before the Apex Court was removed pursuant to enquiry held against him. Various challenges were made to the order of dismissal upto the High Court. Before the Apex Court it was contended that there was fragrant violation of departmental instructions in conducting the enquiry against the Petitioner. In that case instruction had been issued by the Corporation for conduct of

departmental enquiry by an independent agency. While the enquiry was pending before the impartial officer, contrary to the instructions, it was transferred to the departmental officer. It was therefore, contended that this is violation of departmental rules and natural justice and fair play. The Apex Court negatived the said contention.

. In passing we may also point out that in so far as subordinate legislation is concerned, it can be retrospective so also the exercise of power under Article 309. It was so held by the Apex Court in the case of G. Nagendra Vs. State of Karnataka and Ors. (1998) 9 Supreme Court Cases 439. The Apex Court observed as under :

> "It is seen that the rules are framed under Article 309 of the Constitution and it is too late in the day to dispute that such Rules cannot be given retrospective effect."

9. From the above, we may know come to the facts of the present case. Admittedly there were G.R.s and guidelines by the State. We cannot agree that these G.R.s or guide-lines are rules made under

Article 309 of the Constitution as held by the Full Bench of the Tribunal. The G.R. s issued are not in the exercise of power under Article 309. In the instant case, as noted earlier, the power under article 309 is only pending legislation by the competent legislature. On the facts of the present case, we have competent legislation which has been made. It is pursuant to the power of the delegation, conferred under the Act that the rules have been framed. In the instant case, as we have seen the disciplinary authority has been notified. The Disciplinary authority cannot impose punishment unless the enquiry is held. It is therefore, clear that the power to hold enquiry is incidental to the holding of disciplinary proceedings to impose punishment or to take disciplinary action against the delinquent employee. It flows that the power conferred upon him to impose the punishment. At the highest it is only in the matter of procedure that some instructions can be issued. At any rate such instructions can never have an effect of taking away the powers conferred on the Disciplinary authority. Guidelines or even administrative instructions does not divest the disciplinary authority from holding the enquiry himself or appoint another person to hold enquiry. We are clearly of the opinion therefore, that there

has been no violation of rules or for that matter violation of principles of natural justice and or fair play. We therefore, find that there is no infirmity in the ultimate conclusions arrived at by the Full Bench judgement. Having said so clearly the impugned order will have to be set aside.

10. That takes us to the last question. In the instant case, we find after the order of the MAT and as there was no stay by this court, petitioner was taken back in service on 26.12.2000. We were earlier inclined to consider whether on the facts of the case, punishment imposed was disproportionate. We were informed that apart from the period for which the order is passed, in the past services record of the Petitioner there was nothing adverse. However, we find that after the petitioner was taken back in service on 26.12.2000, as there was no stay, he has remained absent with effect from 11.8.2001 to 28.2.2003 for 569 days for which another departmental enquiry has been ordered. That being the case, we are not inclined to interfere with the punishment imposed. A copy of the letter sent to the A.G.P. is taken on record.

. Rule made absolute accordingly. No order as

to costs.

11. We however, make it clear that whatever wages and other emoluments that have been paid to respondent on being taken back in service from 26.12.2000 till he being relieved should not be recovered back from him for any purpose whatsoever.

(F.I. REBELLO,J.)

(S.P. KUKDAY,J.)